83-1514

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ALEXANDER L. STEVAS
CLERK

No._____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

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DODSON CHRISTOPHER COUCH,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

* * * * * * * * * * * * * * * * * * *

PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

* * * * * * * * * * * * * * * * * * *

BRIEF OF PETITIONER

* * * * * * * * * * * * * * * * * * *

ARTHUR J. HANES, JR.
933 Frank Nelson Building
Birmingham, Alabama 35203
(205) 324-9536
VIRGINIA A. VINSON
617 Frank Nelson Building
Birmingham, Alabama 35203
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ATTORNEYS FOR PETITIONER

No._____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

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vs.

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QUESTIONS PRESENTED

1. Is the Alabama Habitual Felony Offender Act in compliance with the guidelines set forth by this Court in Solem v. Helm, __U.S.__, 103 S.Ct. __, 77 L.Ed.2d 657 (1983), which established the precepts to follow in sentencing under recidivist laws.

2. Were the petitioner's due process rights violated when an alleged prior conviction was used to enhance his punishment although the State of Alabama did not affirmatively establish that the petitioner had been represented by counsel or had waived counsel at the time of prior conviction.

PARTIES

In the Circuit Court of Winston County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, who is the Respondent herein and Dodson Christopher Couch, who is the Petitioner herein.

The matters at issue here were first raised in the Circuit Court of Winston County, Alabama, and have been at issue throughout these proceedings.

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OPINIONS BELOW

The decision of the Court of Criminal Appeals of Alabama affirming the Petitioner's conviction was issued on August 16, 1983, without opinion.

The decision of the Alabama Supreme Court denying the Petitioner's writ of certiorari was rendered on December 16, 1983, without opinion.

JURISDICTION

The order of the Supreme Court of Alabama wherein the writ of certiorari was denied was issued on December 16, 1983, and this petition is filed within sixty days of that date.

The Jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved in Petitioner's writ include the Sixth Amendment to the Constitution of the United States, the Eighth Amendment to the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States. A copy of these amendments are submitted as Appendix "C" to this petition.

STATUTORY PROVISIONS INVOLVED

At issue in this case is the constitutionality of §13A-5-9, Code of Alabama, 1975, regarding punishment for habitual felony offenders. A copy of this statute is submitted as Appendix "D" to this petition.

STATEMENT OF THE CASE AND FACTS

I

Following a conviction for burglary, third degree, and a sentencing held under the Alabama Habitual Offender Act, the petitioner appealed to the Alabama Court of Criminal Appeals.

The basis of the petitioner's appeal was two-pronged. Initially, the petitioner alleged that the sentencing hearing held under the habitual offender act was improper in that the State of Alabama failed to properly prove the prior conviction offered. Secondly, the petitioner raised the constitutionality of §13A-5-9, Code of Alabama, 1975, the habitual felony offender act, contending that it violated his rights under the Eighth Amendment to the Constitution of the United States.

On August 16, 1983, the Court of Criminal Appeals of Alabama affirmed the conviction without opinion. An application for rehearing raising the same issues was denied without opinion on October 4, 1983.

Mr. Couch then petitioned the Supreme Court of Alabama for a writ of certiorari alleging substantially the same issues. The petition was denied without opinion on December 16, 1983.

II

The petition is based on the following facts:

The petitioner was arrested in Cedar Bluff, Alabama for driving under the influence of alcohol and his car was impounded by the local police. During an inventory of the vehicle certain items were found in the trunk which had been stolen from the

home of a Mrs. Tommie Lowe.

The petitioner was found guilty and a aeparate sentencing hearing held. At sentencing the State proffered two prior offenses, theft by taking and perjury. Over defense objections the trial judge considered the conviction for theft by taking to be a prior felony conviction. However, the judge refused to use the evidence offered by the State concerning the prejury conviction as a prior felony. The petitioner was therefore sentenced under the Alabama Habitual Offender Act as having one prior felony conviction.

SUMMARY OF THE ARGUMENT

The statute under which the petitioner was sentenced is unconstitutional in that it violates the Eighth Amendment rights of cruel and unusual punishment. The Alabama statute totally ignores the principle of proportionality so protected by this Honorable Court and mandates fixed punishment for various classifications of felony offenses. No guidelines are used by the Alabama courts to aid them in establishing the appropriate punishment for the specific offense.

In order to invoke a recidivist statute a prior conviction of the offender must be established and it must be proven that at the time of prior conviction he was represented by counsel or had knowingly and voluntarily waived the right to counsel.

Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319.

ARGUMENT

I

The petitioner in the case at bar was sentenced under the provisions of the Alabama Habitual Felony Offender Act, §13A-5-9, Code of Alabama, 1975. At the time of the sentencing the Alabama courts were without guidelines to follow in imposing prison terms under the habitual offender act. The only assistance given the sentencing courts were the range of punishment and the mandatory degrees of enhancement for repeat offenders. This area has since been somewhat clarified by a decision of this Honorable Court issued June 28, 1983, Solem v. Helm, __U.S.__, 103 S.Ct.__, 77 L.Ed.2d 657 (1983), wherein it was determined that in certain cases the punishment imposed by a sentencing

judge is disproportionate to the crime and is a violation of the Eighth Amendment's prohibition of cruel and unusual punishment.

This Court set forth criteria to guide the state courts in determining the sentence to impose. They are:

> 1. The gravity of the offense and the harshness of the penalty.
> 2. A comparison of the sentence imposed on other criminals in the same jurisdiction.
> 3. A comparison of the sentences imposed for commission of the same crime in other jurisdictions.

The petitioner acknowledges that in the Solem case the specific facts dealt with a sentence of life without parole, but this Court did not limit the principle of proportionality to sentences of life without parole. Indeed, the holding in the case established this fact.

> "In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. . . . But no penalty is per se constitutional. . . .(A) single day in prison may be unconstitutional in some circumstances."

The concept set forth by this Court is one that has been deeply rooted in our judicial system. The orgin of this principle was traced from the Magna Carta in 1215 to the English Bill of Rights which was the foundation of our own Eighth Amendment. By adopting the cruel and unusual punishment aspect of the English Bill of Rights we also adopted the principle of proportionality, and our courts have sought to uphold this concept over the years.

Without invoking the habitual offender act Mr. Couch would have been facing

a sentence of one year, one day to ten years, as a Class C offender. Under the recidivist act he was dealt a fifteen year sentence that is more than a Class A felony of murder, rape, kidnapping or robbery could carry. (Class A felony- ten years to ninety-nine years with possibility of parole.)

The case at bar is dealing with a nonviolent offense. The alleged prior conviction under which Mr. Couch was erroneously sentenced was from all indications also nonviolent.

It is a travesty for this Court or the courts of the state of Alabama to allow a man to be arbitrarily sentenced to a prison term without the proper sentencing procedures being followed. The Alabama recidivist act is not in compliance

with the requirements set forth by this Court in Solem v. Helm, supra. The legislative statute should be brought into conformity with the mandates of this our highest Court as it seeks to interpret our fundamental and basic rights as a citizen of the United States. To properly protect the rights of Mr. Couch as set forth in the Eighth Amendment, the criteria for determining the proportionality of the punishment must be used. The Alabama statute by not adhering to these standards has violated the petitioner's inherent rights under the Eighth Amendment to the Constitution of the United States.

II

The petitioner proposes to this Honorable Court that reversible error occurred during the sentencing hearing of this case in that the State of Alabama failed to properly prove that Mr. Couch wsa represented by counsel or waived counsel, at the time of his prior conviction, and the documents used to prove such conviction were inadequate. In order to establish a prior conviction under the Alabama Habitual Offender Act, the State must prove that there has been a prior felony conviction and at the time of the conviction the appellant had been represented by counsel or knowingly and voluntarily waived his right to counsel. Watson v. State, 392 So.2d 1274; Baker v. United States, 494 F.2d 508 (5th Cir. 1974); Rollins v. State, 342 So.2d 952,

writ denied, Ex parte State, ex rel Attorney General, 342 SO.2d 959; and William v. State, 393 So.2d 492 (1981).

In the present case the State introduced an "Indictment and Accusation" (T. 19-21) from the Superior Court of Floyd County, Georgia. No offer of proof was made by the State to show that counsel represented Mr. Couch at the time he was found guilty of theft by taking or, in fact, that the court formally adjudged him to be guilty of this offense.

In McGhee v. State, 412 So.2d 327 (Ala.Cr.App. 1982) the Court of Criminal Appeals in reversing a decision of the Etowah County Court, stated that:

> "Unless an accused actually admits his prior convictions. . ., the State must prove his record in order to trigger the opera-

tion of the habitual offender sentencing provisions." (Emphasis added)

In the case under consideration, the petitioner did not admit any prior conviction, and it is his position that the State failed to properly prove the conviction.

The failure to determine whether there had been representation by counsel or whether it had been voluntarily waived is a most greivous error. In support of this position is the case of Highsmith v. State, 314 SO.2d 874 (1975) which reversed a lower court's decision allowing evidence of a prior conviction wherein the appellant had not been represented by counsel. The State case relied on a decision of this Honorable Court in rendering their decision.

> " The Supreme Court of the United States determined in Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed2d 319, that a state may not use the record of a prior conviction to enhance the punishment in a given case without first affirmatively establishing that the accused was represented by counsel or waived counsel at the time of such prior offense." (Emphasis added)

This was not done in the case at bar. No attempt was made to "affirmatively establish" that the appellant had been represented by counsel during the prior case and as far as the record indicated, we have no knowledge that he, in fact, had counsel or knowingly waived counsel, or even if the case were a final judgment of conviction.

In Rollins, supra, a minute judgment was used to prove a prior conviction and the Alabama Court of Criminal Appeals, in reversing, said that no proof appeared in

in the record that the defendant had been represented by counsel or waived counsel and that absent such proof the judgment entry was not admissible to prove the prior conviction. The court went on to say that "presuming the defendant was represented by counsel from a silent record would also be impermissible". The corollary would be that a defendant cannot be presumed to have been found guilty and adjudged so by the court where the record is silent.

In Baker v. United States, supra, the appellant was sentenced in a United States District Court under an enhanced punishment statute wherein the judge considered three Federal convictions. The appellate court stated that:

> "he (United States District Judge) assumed since these were

> Federal convictions they must have occurred ' during proceedings where (appellate) was either represented by counsel or waived counsel.'"

The Fifth Circuit Court of Appeals, in reversing the case said that there was no "basis" for the judge's "summary assumption" of representation by counsel and the cases should not have been used to enhance the appellant's sentence unless it had been properly established.

The right to counsel is fundamental and essential to a fair trial in the courts of our land and our case law has long held this to be an inherent right under the Sixth Amendment of the United States Constitution and Article 1, Section 6 of the Alabama Constitution of 1901. Therefore, in order to use a prior conviction to enhance punishment on a present offense it must be proven that at the time of the

prior conviction he was represented by counsel or had knowingly and voluntarily waived the right to counsel.

The present case does not even go so far as to presume that the appellant had been represented by counsel or waived counsel. The face of the indictment indicates that Mr. Couch was represented by counsel at arraignment, but is silent as to representation at trial. Furthermore, the papers furnished by the Floyd County Circuit Clerk's office only show an indictment and accusation wherein a grand jury charged Mr. Couch with theft by taking. Nowhere does it show that Mr. Couch was adjudged guilty by the Court. These papers do not represent the judgment and order entered by the court, if in fact any such orders were ever entered, and it cannot be used to properly prove a former convic-

tion . Palmer v. State, 312 So.2d 399 (1957) and Highsmith, supra. These purported documents only serve to show that Mr. Couch was charged with this offense and they do not show whether he was represeted by an attorney. This falls short of being the "judgment of conviction" necessary for proof. C. Gamble, McElroy's Alabama Evidence, §39.07.

The purpose of introducing the records of prior convictions is twofold. Firstly, under the Alabama Habitual Felony Offender Act the prior convictions are used to enhance the punishment of the cuurent offense and the records are offered to prove the convictions. Secondly, the trial docket sheet, or judgment of conviction, is used to inform the sentencing judge of the salient facts of the conviction. In order for the judge to properly carry out the laws

surrounding habitual offender sentencing the State must "affirmatively establish" the requisite predicates for the convictions to be used. i.e., representation or waiver of counsel, felony offense, and conviction, and the judge must do more than "assume" these predicates have been properly established. Highsmith, supra, and Baker v. United States, supra. This cannot be done from a silent record.

Even more binding is the fact that the State, in its brief to the Alabama Court of Criminal Appeals conceded this point.

> " The Defendant argues that the Court erred in sentencing him under the Habitual Offender statute when it relied on an indictment for theft and grand jury list which returned the indictment theft (R.pp. 19-20) to enhance his punishment. The State agrees with the Defendant that the court can not rely on these documents to enhance the punishment but must rely on evidence

proving conviction."
(State's brief p. 3)

However, the State goes on to say in its brief that there was proof of a perjury conviction in the record "upon which the judge could have reached the same sentence." (State's brief p. 3) The transcript of the proceedings show that during the sentencing the trial judge made the following pronouncement concerning the perjury:

> THE COURT: Le 's do it this way. The Court finds that the State by a preponderance of the evidence has presented evidence of a prior, one prior felony conviction, that being for theft by taking in the State of Georgia and that <u>there is a question as to the conviction for perjury</u> in said State of Georgia. (R. 91-92)
> (Emphasis added)

It is readily apparent from the record that the judge did not intend to use the perjury charge as a prior conviction.

Defense counsel had moved that the court not consider the perjury charge and the judge by his own motion stated that there was a question in his mind as to the validity of the charge that lead him specifically to state that he would not use it as a prior conviction to enhance the punishment.

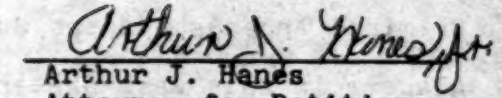
Since the State has admitted that the charge of theft by taking should not be used as a prior conviction and the sentencing judge has concluded that the perjury charge should not be used, it leaves no alternative for this Court but than to conclude that the petitioner's due process rights have been violated. Instead of being sentenced for a Class B felony with a range of punishment from two years to twenty years, he would be eligible for

sentencing as a Class C felony offender which calls for punishment of between one year, one day and ten years, well below his current sentence of fifteen years. The procedure used at the petitioner's sentencing is in blatant conflict with prior decisions of this Honorable Court and decisions of other federal courts and the Alabama state courts.

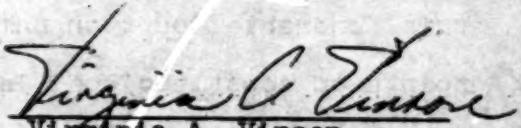
CONCLUSION

In conclusion, the Petitioner, Dodson Christopher Couch, respectfully submits that the decision of the Alabama Court of Criminal Appeals and the Supreme Court of Alabama in this case presents conflicts with the prior decisions and opinions of this Honorable Court on numerous different points of constitutional law. For this reason the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decision of the Courts of Alabama and on such review will reverse the decisions of the Alabama courts and hold that §13A-5-9, Code of Alabama 1975 is in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States.

Respectfully submitted,



Arthur J. Hanes
Attorney for Petitioner



Virginia A. Vinson
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been mailed to the attorneys for the Respondent, certified mali, this the 13th day of February, 1984, and addressed as follows:

Honorable Charles A, Graddick
Attorney General
250 Administrative Building
Montgomery, Alabama 36130

Arthur J. Hanes, Jr.
Attorney for Petitioner
933 Frank Nelson Building
Birmingham, Alabama 35203
(205) 324-9536

Virginia A. Vinson
Attorney for Petitioner
617 Frank Nelson Building
Birmingham, Alabama 35203
(205) 252-4908

APPENDIX "A"

THE ALABAMA COURT OF CRIMINAL APPEALS
Montgomery, Alabama

Re: CC81-180

6th Div. 182 Winston County Circuit Court

DODSON CHRISTOPHER COUCH, JR.

Appellant

vs.

THE STATE,

Appellee

Dear Sir: This is to advise you that on August 16, 1983 the Court of Criminal Appeals announced decision of: affirmance - no opinion - in the above stated cause.

Very truly yours,

Mollie Jordon, Clerk

THE ALABAMA COURT OF CRIMINAL APPEALS
Montgomery, Alabama

Re: CC81-180

6th Div. 182 Winston County Circuit Court

DODSON CHRISTOPHER COUCH, JR.,

Appellant

vs.

THE STATE,

Appellee

Dear Sir: This is to advise you that on October 4, 1983, the Court of Criminal Appeals announced the decision of: application for rehearing overruuled - no opinion - in the above stated cause.

Very truly,

Mollie Jordon, Clerk

COURT OF CRIMINAL APPEALS

STATE OF ALABAMA

P. O. BOX 351

MONTGOMERY 36101

December 19, 1983

JOHN O. HARRIS
Presiding Judge

MOLLIE JORDON
Clerk

JOHN C. TYSON, III

JOHN P. DeCARLO

JOHN G. BOOKOUT

WILLIAM M. BOWEN, JR.

Judges

Honorable Virginia A. Vinson
Attorney at Law
617 Frank Nelson Building
Birmingham, Alabama 35203

Dear Ms. Vinson:

Re: 6 Div. 182, Dodson C. Couch, Jr.
v. State

The Court of Criminal Appeals has today granted a stay of sixty (60) days from December 16, 1983, to allow filing of a petition for writ of certiorari in the United States Supreme Court. This stay

will remain in effect until action is taken on the petition, and if petition is granted, until a decision is rendered by the United States Supreme Court.

The certificate of final judgment has been recalled from the lower court pending determination by the United States Supreme Court, but the certificate will be reissued upon the expiration of the sixty-day stay unless this Court is furnished with proof of the filing of said petition in the United States Supreme Court. SEE RULE 20, RULES OF THE SUPREME COURT OF THE UNITED STATES.

Very truly yours,

/s/ Mollie Jordon
Clerk

cc: Clerk, Circuit Court of Winston County
Office of the Attorney General
File

APPENDIX "B"

MAILING ADDRESS: Telephone: 832-6480

P.O. Box 157
Montgomery, Alabama 36101

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 83-92

EX PARTE: DODSON CHRISTOPHER COUCH
PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS
(Re: Dodson C. Couch, Jr. vs. State

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

____Appeal docketed. Future correspondence should refer to the above number

____Court Reporter granted additional time to file reporter's transcript to and including

____Clerk/Register granted additional time to file clerk's record on appeal to and including

____ Appell____granted 7 additional days to file brief to and including

____ Appellant(s) granted 7 additional days to file brief to and including

____ Record on Appeal filed

____ Appendix Filed

____ Submitted on Briefs

xxx Petition for Writ of Certiorari denied No opinion. Adams, J.- Torbert, CJ, Faulkner, Almon and Embry, JJ., concur.

____ Application for rehearing overruled. No opinion. No opinion written on rehearing.

____ Permission to file amicus curiae briefs granted.

____

/s/ Robert G. Esdale, Clerk
Supreme Court of Alabama

December 16, 1983

bsa

APPENDIX "C"

United States Constitution - Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been commited, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution - Eighth Amendment

Excessive bail shall not be required,

nor excessive fines imposed, nor cruel and unusual punishment.

United States Constitution - Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "D"

Code of Alabama 1975:

§13A-5-9. Habitual felony offenders - Additional penalties.

(a) In all cases when it is shown that a criminal defendant has been previously convicted of any felony and after such conviction has committed another felony, he must be punished as follows:

(1) On conviction of a Class C felony, he must be punished for a Class B felony;
(2) On conviction of a Class B felony, he must be punished for a Class A felony;
(3) On conviction of a Class A felony, he must be punished by imprisonment for life or for any term of not more than 99 years but not less than 15 years.

* * * * * * *

§13A-5-9. Sentences of imprisonment for felonies.

(a) Sentences for felonies shall be for a definite term of imprisonment, which imprisonment includes hard labor, within the following limitations:

(1) For a Class A felony, for life or not more than 99 years or less than 10 years.

(2) For a Class B felony, not more than 20 years or less than 2 years.

(3) For a Class C felony, not more than 10 years or less than 1 year and 1 day.

(4) For a Class A felony in which a firearm or deadly weapon was used or attempted to be used in the commission of the felony, not less than 20 years.

(5) For a Class B or C felony in which a firearm or deadly weapon was used or attempted to be used in the commission of the felony, not less than 10 years.